**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
Civil Action No. 1:07-cv-00231-LHT-DLH**

C. BURGESS,

Plaintiff,

v.

EFORCE MEDIA, INC., et al.,

Defendants.

DEFENDANT PRICEGRABBER.COM, INC.'S OBJECTIONS TO MAGISTRATE'S RECOMMENDATION NO. 6

Pursuant to Rule 72(a), Defendant PriceGrabber.com, Inc. ("PriceGrabber") respectfully submits its Objections to Magistrate Judge Dennis Howell's August 12, 2007 ***sua sponte*** Recommendation No. 6 that the Stipulation of Dismissal (#26) – signed by Plaintiff Albert C. Burgess, Jr. and PriceGrabber and filed on July 23, 2007 – be stricken.

PriceGrabber's settlement with Plaintiff should not be disturbed by an overbroad, and unsolicited, reading of Rule 41 that would contradict public policy encouraging settlement. If the magistrate's recommendation were adopted, no plaintiff would be able voluntarily to dismiss any single defendant without either (1) dismissing the entire action against all defendants or (2) moving for leave to amend his complaint. In this case, a month after PriceGrabber was removed from the Court's docket, Magistrate Howell recommends that PriceGrabber be dragged unwillingly back into the litigation until Plaintiff resolves his disputes with each of the other ten (10) defendants.

To address the magistrate's concern regarding Rule 41 compliance, and to encourage settlement, PriceGrabber respectfully asks the Court to reaffirm the dismissal of PriceGrabber by entering the concurrently submitted proposed order. Under Rule 41(a)(2), the Court has power to dismiss "upon terms and conditions as the court deems proper." Here, as evidenced in

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the Stipulation of Dismissal, Plaintiff and PriceGrabber settled all of their claims and agreed to bear their own costs.

FACTUAL BACKGROUND

Plaintiff filed the current action related to alleged damage to his computer in state court against eleven separate defendants: (1) EFORCE MEDIA, INC.; (2) IWIZARD HOLDING, INC.; (3) ADKNOWLEDGE, INC.; (4) BASEBALL EXPRESS, INC.; (5) ALLEN-EDMONDS SHOE CORPORATION; (6) INTERSEARCH GROUP, INC.; (7) TRUSCO MANUFACTURING COMPANY; (8) PRICEGRABBER.COM, INC.; (9) SHOPZILLA, INC.; (10) DAZADI, INC.; and (11) SIX THREE ZERO ENTERPRISES, LLC. The multiple defendants are represented by separate counsel, have separate business activities and are not all named in the same cause of action.

After the action was removed to this Court, PriceGrabber answered the complaint and later entered into a confidential settlement agreement with Plaintiff. On July 23, 2007, PriceGrabber's counsel filed a Stipulation of Dismissal (#26) that contained the signatures of Plaintiff, *pro se*, and PriceGrabber's counsel. PriceGrabber was subsequently removed as a party from the Court's docket. No party has challenged the entry of the Stipulation of Dismissal.

On August 12, 2007, Magistrate Judge Dennis Howell filed a Memorandum and Recommendation on numerous dispositive and non-dispositive motions (#35). None of the motions submitted to the magistrate involved a challenge to the Stipulation of Dismissal between Plaintiff and PriceGrabber. However, ***sua sponte***, the magistrate found "reason to examine" the PriceGrabber Stipulation of Dismissal and found it defective because (1) it does not contain the signatures of all defendants who had appeared and (2) it dismisses less than the entire action. (Aug. 12, 2007 Memo., 18, 22 [Recommendation No. 6]).

LEGAL STANDARD

"A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1).

ARGUMENT

There is no valid reason to strike the Stipulation of Dismissal between Plaintiff and PriceGrabber, as it dismisses all claims between the two parties. The Court can affirm the Stipulation by entering an order of dismissal "upon terms and conditions as the court deems proper." *See* Fed. R. Civ. P. 41(a)(2).[1] It is "established policy of the law to encourage settlement of litigation wherever possible." *See, e.g., Long v. Vlasic Food Products Co.*, 439 F.2d 229, 233 (4th Cir. 1971); *see also Bromhal v. Stott*, 341 N.C. 702, 705, 462 S.E.2d 219, 221 (1995) ("We conclude that the public policy of this State encourages settlement agreements…").

Rule 41 provides two methods of voluntary dismissal after a defendant answers the complaint, either with or without court approval. *See* Fed. R. Civ. P. 41(a)(1) ("without order of the court…(ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action."); Fed. R. Civ. P. 41(a)(2) ("upon order of the court and upon such terms and conditions as the court deems proper.").

While the magistrate cites Rule 41 correctly, PriceGrabber respectfully disagrees with the magistrate's broad reading of *Gahagan v. N.C. Highway Patrol*, 2000 U.S. Dist. LEXIS 22226 (W.D.N.C. Oct. 25, 2000). In *Gahagan*, the plaintiff sought to voluntarily dismiss federal claims, while continuing to pursue state law claims. *Id.* at *4-5. This Court declined to accept the parties' stipulation that Plaintiff would dismiss only the federal claims, because it did not dismiss the entire "action" under Rule 41. *Id.* The Court noted that "[a] plaintiff wishing to eliminate particular ***claims or issues*** from the action should amend the complaint under Rule 15(a) rather than dismiss under Rule 41(a)." *Id.* at *5 (emphasis added), citing Moore's Federal Practice 3d, § 41,21[2] (citing *Skinner v. First Am. Bank of Virginia*, 64 F.3d 659 (table), 1995

[1] "The power to drop…some defendants from the suit plainly exists, either in the Civil Rules or in the inherent power of the district court. Nevertheless it seems undesirable and unnecessary to invoke inherent power to avoid a limit on Rule 41(a) that is reached only by an overly literal reading of the rule." Wright & Miller, Fed. Practice and Procedure Civ. 2d (1995) § 2362 at p.252.

WL 507264 (4th Cir. 1995)). The *Gahagan* opinion discusses only the stipulated dismissal of certain claims, not the stipulated dismissal of certain parties. *See also Stellar Ins. Group, Inc. v. Cent. Cos., LLC*, 2007 U.S. Dist. LEXIS 57938 (W.D.N.C. Aug. 7, 2007) (denying voluntary dismissal of claims, not parties); *Livesay v. Carolina First Bank*, 2007 U.S. Dist. LEXIS 21497 (W.D.N.C. Mar. 14, 2007) (denying voluntary dismissal of claims, not parties).

Here, unlike the *Gahagan* parties, Plaintiff and PriceGrabber *have agreed to dismiss all claims and issues* between them – not just particular causes of action – so there is no dispute between them to be litigated or decided by the Court. *Gahagan* did not hold that a defendant is precluded from dismissal, where there are multiple other defendants who have not settled. To so hold would be to discourage settlement of individual defendants and force defendants to remain in litigation until all *codefendants* agree to each other defendant's dismissal.

The magistrate's recommendation asserts that, instead of Rule 41, the proper procedure following settlement to dismiss a defendant is "amendment of the Complaint to reflect active claims and active defendants, [so that] the court as well as the public can remain aware of the charges plaintiff is making." (Aug. 12, 2007 Memo., p. 19). PriceGrabber does not oppose the suggestion that Plaintiff amend the complaint to remove PriceGrabber from the caption; however, if generalized, this practice would likely lead to numerous amendments and motion practice where a plaintiff sues multiple defendants. Each amendment would require a motion for leave to amend under Rule 15, requiring judicial review and proper notice to all parties, and responsive pleadings from all remaining defendants. *See* Fed. R. Civ. P. 15(a) (requiring responsive pleadings within 10 days after service of amended pleadings). In this case, assuming Plaintiff settles with all eleven defendants separately, the Court may be facing a Tenth Amended Complaint, as many pleading motions and voluminous responsive pleadings.

In light of the magistrate's concerns regarding Rule 41 compliance, PriceGrabber proposes that the Court enter an order pursuant to the Stipulation of Dismissal between PriceGrabber and Plaintiff. Although phrased as a recommendation to strike the Stipulation of Dismissal, the magistrate's recommendation addresses the practical *effect* of the Stipulation of

Dismissal in dismissing PriceGrabber – not that the Stipulation was improperly filed. Once approved by this Court's order, the Stipulation of Dismissal unquestionably will be effective under Rule 41(a)(2).

CONCLUSION

For the foregoing reasons, and pursuant to the Rule 72(a), PriceGrabber objects to the Magistrate Judge's August 12, 2007 Recommendation No. 6 and respectfully requests that this Court review that Recommendation and enter the proposed order filed concurrently herewith.

This 30th of August, 2007.

s/Brian J. Recor
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Counsel for Defendant PriceGrabber.com, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed a copy of the foregoing **STIPULATION OF DISMISSAL** with the Clerk of Court using the ECF system that will send notification thereof to the following:

Kenneth R. Raynor TEMPLETON & RAYNOR 1800 East Boulevard Charlotte, NC 28203 ken@templetonraynor.com	Jacqueline Grant ROBERTS & STEVENS, P.A. P.O. Box 7647 Asheville, NC 28802 jgrant@roberts-stevens.com
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I have further served a copy of the foregoing **STIPULATION OF DISMISSAL** on Plaintiff by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to:

C. Burgess
P. B. 6355
Hendersonville, NC 28793

This 30th day of August, 2007.

s/Brian J. Recor